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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 JOSHUA GRAHAM,

11 Plaintiff,

12 v.

13 D. BASSHAM, P. ROBINSON,  
14 et al.,

15 Defendants.

CASE NO. 16-cv-5597-BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR: January 12, 2018

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17 The District Court has referred this 42 U.S.C. § 1983 civil rights action to United  
18 States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and  
19 (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4.

20 Although plaintiff has made allegations that, if proven, would be tantamount to  
21 deliberate indifference by defendants, those bare allegations are not supported by any  
22 admissible evidence. All of the admissible evidence leads to the opposite conclusion. In  
23 these circumstances, the Supreme Court and the Ninth Circuit have directed this Court to  
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1 conclude that plaintiff's claim cannot proceed and that defendants' motion for summary  
2 judgment should be granted.

3 Defendants are dentists and dental clerks employed by the DOC during the time of  
4 the alleged violations. Amended Complaint, Dkt. 37, ¶ 60. Plaintiff is an inmate at the  
5 Washington State Penitentiary ("WSP") and alleges that defendants violated his Eighth  
6 Amendment rights by allegedly removing the wrong tooth, denying him treatment of the  
7 correct tooth, and denying him emergency care and medication refills. *Id.* He also alleges  
8 the tort violations of medical malpractice and negligence. *Id. Id.* Defendants move for  
9 summary judgment, arguing in part that plaintiff's claims are unsupported by the factual  
10 record. Dkt. 53.

12 Although plaintiff attempts to raise an issue of material fact with his own  
13 allegations, plaintiff's allegations are directly and repeatedly contradicted by the record.  
14 Therefore, no reasonable fact finder could conclude that plaintiff's version of the facts is  
15 correct, and defendants' motion for summary judgment should be granted as to plaintiff's  
16 claims.

### 17 **BACKGROUND and FACTS**

18 Plaintiff "is a long time resident of Washington State and was incarcerated at  
19 Washington State Penitentiary ["WSP"] during all times relevant to [h]is complaint."  
20 Dkt. 37, ¶ 5. On or about July 9, 2013, plaintiff "started experiencing extreme pain and  
21 'bitter fluid' leaking from upper right teeth and asked WDOC Dental at WSP for an  
22 appointment." *Id.* at ¶ 8. Although plaintiff wanted less drastic treatment, because of pain,  
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1 plaintiff agreed to have one of his chewing molars removed by defendant Dr. D.  
2 Bassham, DDS. on July 18, 2013. *See id.* at ¶ 11.

3         Shortly thereafter, plaintiff reported that he still had severe pain in the upper right  
4 corner of his mouth, and believed that Defendant Bassham had removed the incorrect  
5 tooth *Id.* at ¶ 13; Dkt. 54-1, p. 4. On July 24, 2013, defendant Dr. Grant Rodkey, DDS,  
6 examined plaintiff and took an x-ray. Dkt. 37, ¶¶ 14-18. According to the treatment  
7 record, a “portion of distal tuberosity appears to have [fractured].” Dkt. 54-1, p. 4. Dr.  
8 Rodkey informed plaintiff that this fracture was causing [some of] his pain. Dkt. 37, ¶ 15;  
9 Dkt. 59-1, p. 3. The treatment record indicates that Dr. Rodkey informed plaintiff that he  
10 recommended not extracting the remaining upper right molar “due to sensitivity due to  
11 last chewing molar on [upper right] side [of] mouth.” Dkt. 59-1, p. 3. The record also  
12 indicates that Dr. Rodkey recommended to plaintiff that he tolerate the pain “until he gets  
13 out and can have endo therapy.” *Id.* Dr. Rodkey apparently advised plaintiff to try to  
14 keep one chewing molar intact in the upper right side of his mouth.

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16         On August 14, 2013, plaintiff ran out of his prescribed medication “and he was  
17 still experiencing pain in his right temple.” Dkt. 37, ¶ 20. He made a request to a nurse  
18 regarding getting a dental appointment, and also to acquire more medication. *Id.* at ¶ 21.

19         This nurse emailed defendant Edith Escapule regarding the requested dental  
20 appointment. *Id.* at ¶ 22. According to the email chain, because plaintiff referred to his  
21 fractured distal tuberosity as a broken jaw, defendant Escapule indicated at the end of the  
22 email confirming an appointment in eight days that plaintiff “needs to stop lying to staff,”  
23 as “neither one of the dentists broke his jaw . . . .” Dkt. 57-1, p. 2. Plaintiff alleges that  
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1 because of this email response, the unit nurse “denied [plaintiff] any pain medication  
2 (Naproxen) leaving [plaintiff] in serious pain and denying treatment.” Dkt. 37, ¶ 24.

3 Plaintiff declared another dental emergency, and was seen by defendant Dr.  
4 Jonathan Gantz, DDS, on August 16, 2013. *Id.* at ¶ 26. According to Dr. Gantz' treatment  
5 record, plaintiff reported having pain in the upper right quadrant, reported that he had ran  
6 out of meds, and reported that “while on meds he had no pain.” Dkt. 58, p. 1, ¶ 4; *see also*  
7 Dkt. 58-1, pp. 2-3. This treatment record also indicates that the x-rays performed “appear  
8 inconclusive as to healing of fractured tuberosity.” Dkt. 58-1, p. 2. Dr. Gantz performed  
9 an exam and noted his observations: “clinically, healing appears normal -- no swelling or  
10 redness.” *Id.* at 2-3.

12 Plaintiff alleges that he continued to complain in various ways about pain and  
13 swelling over the course of the next 10 days. *See e.g.*, Dkt. 37, ¶¶ 30, 32-33. On August  
14 29, 2013, plaintiff “went to the evening pill line and spoke with Deborah Richter RN2.”  
15 *Id.* at ¶ 38. She gave him a quick exam and medications which brought down his swelling  
16 and gave him pain relief. *Id.* at ¶¶ 38-39; *see also* Dkt. 71, p. 44 (Exhibit “F”).

17 On September 4, 2013, plaintiff again sought treatment with Dr. Rodkey, and did  
18 not receive the treatment he desired (extraction of tooth #3). Dkt. 37, ¶¶ 45-47. Plaintiff  
19 continued to complain and file grievances regarding pain. *See id.* at ¶¶ 48-51. On October  
20 24, 2013, and on November 5, 2013, plaintiff again unsuccessfully sought extraction of  
21 his number three molar from Dr. Rodkey. *See id.* at ¶¶ 52-53. On November 15, 2013,  
22 plaintiff sought treatment from Dr. Gantz, who extracted plaintiff's remaining upper right  
23 chewing molar (tooth #3). *See id.* at ¶ 55.

## PROCEDURAL HISTORY

Plaintiff, JOSHUA GRAHAM, proceeding *pro se* and *in forma pauperis* (Dkts. 1, 4), filed his complaint on July 7, 2016. Dkt. 5. Plaintiff filed an amended complaint on May 25, 2017. Dkt. 37. Defendants served plaintiff with a *Rand* notice and copies of the motion for summary judgment and supporting documentation on September 13, 2017. *See* Dkts. 53-60. Plaintiff filed a response to defendants' motion for summary judgment on November 25, 2017. Dkts. 70-71. Defendants filed their reply on December 1, 2017. Dkt. 72.

Plaintiff's amended complaint was signed under penalty of perjury and is being considered as evidence. Dkt. 37, p. 31. Because plaintiff is *pro se*, the Court "must consider as evidence in his opposition to summary judgment all of [plaintiff's] contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [plaintiff] attested under penalty of perjury that the contents of the motions or pleadings are true and correct." *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

## STANDARD OF REVIEW

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute over the material facts before the court and the moving party is entitled to judgment as a matter of law. *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1136 (9th Cir. 1975), *overruled on other grounds by Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990). The moving party is entitled to summary judgment if the evidence produced by

1 the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
2 251 (1986). To determine if summary judgment is appropriate, the court must consider  
3 whether particular facts are material and whether there is a genuine dispute as to the  
4 material facts left to be resolved. Fed. R. Civ. P. 56(c). Where there is a complete failure  
5 of proof concerning an essential element of the non-moving party's case on which the  
6 nonmoving party has the burden of proof, all other facts are rendered immaterial, and the  
7 moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477  
8 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 254 ("the judge must view the evidence  
9 presented through the prism of the substantive evidentiary burden"). However, when  
10 presented with a motion for summary judgment, the court shall review the pleadings and  
11 evidence in the light most favorable to the nonmoving party, *Anderson*, 477 U.S. at 255  
12 (citation omitted), and "a pro se complaint will be liberally construed . . . ." *Pena v.*  
13 *Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 106  
14 (1976)) (other citation omitted). With these standards in mind, it is important to note that  
15 plaintiff bears the burden of proof at trial over the issues raised in this motion, *e.g.*,  
16 whether defendants acted with deliberate indifference or failed to follow the accepted  
17 standard of care for a healthcare provider. See *Grimes v. City and Country of San*  
18 *Francisco*, 951 F.2d 236, 239 (9th Cir. 1991).

21 Once the moving party has carried its burden under Fed. R. Civ. P. 56, the party  
22 opposing the motion must do more than simply show that there is some metaphysical  
23 doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574,  
24 586 (1986). The opposing party cannot rest solely on his pleadings but must produce

1 significant, probative evidence in the form of affidavits, and/or admissible discovery  
2 material that would allow a reasonable jury to find in his favor. *Id.* at n.11; *Anderson*,  
3 477 U.S. at 249-50. In other words, the purpose of summary judgment “is not to replace  
4 conclusory allegations of the complaint or answer with conclusory allegations of an  
5 affidavit.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). However,  
6 weighing of evidence and drawing legitimate inferences from facts are jury functions,  
7 and not the function of the court. *See United Steel Workers of America v. Phelps Dodge*  
8 *Corps.*, 865 F.2d 1539, 1542 (9th Cir. 1989).

## 10 DISCUSSION

11 In order to recover pursuant to 42 U.S.C. § 1983, a plaintiff must prove that: (1) the  
12 conduct complained of was committed by a person acting under color of state law and  
13 that (2) the conduct deprived a person of a right, privilege, or immunity secured by the  
14 Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981),  
15 *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986).

### 16 I. Personal Participation

17 Plaintiff concedes defendants’ argument that plaintiff failed to allege the personal  
18 participation of defendant Robinson. Dkt. 70, p. 8. Therefore, defendants’ motion for  
19 summary judgment should be granted as to claims brought against defendant Robinson.

### 20 II. Retaliation

21 Plaintiff concedes defendants’ argument that plaintiff’s “retaliation claims against  
22 defendants Rodkey, Gantz and Robinson are unsupported.” Dkt. 70, p. 10. Therefore,  
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1 defendants' motion for summary judgment should be granted as to plaintiff's claims  
2 alleging retaliation.

3 **III. Claims pursuant to the Eighth Amendment regarding Deliberate**  
4 **Indifference to Medical Needs, and Medical Malpractice and**  
5 **Negligence claims (Washington state law)**

6 Plaintiff alleges that defendants removed the wrong tooth, denied treatment of the  
7 correct tooth, and denied emergency care and medication refills. Amended Complaint,  
8 Dkt. 37, ¶ 60. Defendants contend in part that plaintiff's claims are factually  
9 unsubstantiated.

10 To establish a constitutional violation pursuant to the Eighth Amendment due to  
11 inadequate medical care, a plaintiff must show "deliberate indifference" by prison  
12 officials to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). For an  
13 inmate to state a claim under § 1983 for medical mistreatment or denial of medical care,  
14 the prisoner must allege "acts or omissions sufficiently harmful to evidence deliberate  
15 indifference to serious medical needs." *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct.  
16 995, 117 L.Ed.2d 156 (1992); *Estelle*, 429 U.S. at 106. Such conduct is actionable under  
17 42 U.S.C. § 1983. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992),  
18 *reversed on other grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th  
19 Cir. 1997). "Because society does not expect that prisoners will have unqualified access  
20 to health care, deliberate indifference to medical needs amounts to an Eighth Amendment  
21 violation only if those needs are 'serious.'" *Hudson*, 503 U.S. at 9.

22 To establish deliberate indifference, a prisoner must show that a defendant  
23 purposefully ignored or failed to respond to the prisoner's pain or possible medical need.  
24

1 See *McGuckin*, *supra*, 974 F.2d at 1060; *Estelle*, *supra*, 429 U.S. at 104. “Such  
2 indifference may be manifested in two ways. It may appear when prison officials deny,  
3 delay or intentionally interfere with medical treatment, or it may be shown by the way in  
4 which prison physicians provide medical care.” *Hutchinson v. United States*, 838 F.2d  
5 390, 394 (9th Cir. 1988).

6 Mere negligence in diagnosing or treating a medical condition, without more, does  
7 not violate a prisoner's Eighth Amendment rights. *Hutchinson*, 838 F.2d at 394.

8 According to the Supreme Court, an official can be found liable pursuant to the Eighth  
9 Amendment if “the official knows of and disregards an excessive risk to inmate health or  
10 safety . . . .” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

11  
12 Plaintiff also alleges state law claims of negligence and medical malpractice. In  
13 order to sustain a claim for medical malpractice, plaintiff must prove that defendant  
14 health care provider:

15 [F]ailed to exercise that degree of care, skill and learning expected of a  
16 reasonably prudent health care provider at the time in the profession or  
17 class to which he or she belongs, in the State of Washington, acting in  
the same or similar circumstances; [and that] [s]uch failure was a  
proximate cause of the injury complained of.

18 RCW 7.70.040(1) and (2); *see also Branom v. State*, 94 Wash. App. 964, 968 974 P.2d  
19 335 (1999) (“whenever an injury occurs as a result of health care, the action for damages  
20 for that injury is governed exclusively by RCW 7.70”).

21 In order to establish both the standard of care and to prove causation in a medical  
22 malpractice action, in most cases, expert medical testimony is required. *Guile v. Ballard*  
23 *Cnty. Hosp.*, 70 Wash. App. 18, 25, 851 P.2d 689 (1993). Therefore, healthcare  
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1 providers are entitled to summary judgment once they demonstrate the nonmovant's lack  
2 of competent expert testimony demonstrating the standard of care and causation. *Id.*;  
3 *Moringa v. Vue*, 85 Wash. App. 822, 832, 935 P.2d 637 (1997).

4 **a. Alleged removal of the wrong tooth**

5 Plaintiff contends that on July 18, 2013, he indicated to Dr. Bassham "that his  
6 second tooth from the back [tooth #3] was the source of pain and discomfort," but that he  
7 then extracted the last remaining molar -- tooth #2 (tooth #1, a wisdom tooth, already had  
8 been removed a decade previous). Dkt. 70, p. 3. Defendants move for summary  
9 judgment, arguing that plaintiff's "claim that the wrong tooth was extracted [is]  
10 unsupported by the factual record." Dkt. 53, p. 1. Indeed, the only support for this claim  
11 is plaintiff's allegation, which is contradicted in multiple ways by the record.  
12

13 Plaintiff's dental treatment record from July 18, 2013 indicates that plaintiff  
14 "complains of a strong ache in UR [upper right] last molar [tooth #2.]," Dkt. 54-1, p. 4.  
15 This contemporaneous treatment record directly contradicts plaintiff's allegation that he  
16 told the dentist that it was the second to last molar (tooth #3). Furthermore, plaintiff's  
17 dental treatment record indicates that the dentist, Dr. Bassham, examined the last molar --  
18 tooth "#2" -- and noted that it had deep periodontal pocketing and slight mobility of plus  
19 one. *Id.* His exam warranted extraction of tooth #2. *See id.* The Treatment Plan, as well as  
20 the Consent for Dental/Oral surgery form, both signed by plaintiff, also indicate that the  
21 tooth to be pulled would be tooth #2. *See id.* at pp. 6, 7. Furthermore, plaintiff's dental  
22 record from the subsequent period reveals minimal or no swelling in the tooth plaintiff  
23 alleges he was originally complaining about -- tooth #3. *See, e.g.,* Dkt. 59, pp. 2, 10 (on  
24

1 07/24/13: “#3 NPL [no pathologies noted] . . . 0 carries #3 noted”); Dkt. 71, p. 32 (on  
2 8/16/13: “no swelling or redness”); Dkt. 71, p. 44 (on 08/29/13: “Some edema [swelling]  
3 no erythema [redness]”); Dkt. 58-1, p. 3 (on 09/04/13: “#3 shows slight inflammation but  
4 is adjacent to restoration margin”); Dkt. 71, p. 55 (also on 09/04/13: plaintiff “was  
5 afebrile (97.9 degrees)”).

6 Defendants argue that “there is nothing in the factual record to indicate that  
7 [plaintiff’s] tooth #3 need to be pulled on July 18, 2013, that [plaintiff] mistakenly  
8 consented to the extraction of tooth #2, or that Bassham mistakenly extracted tooth #2.”  
9 Dkt. 53, p. 13 (citing Dkt. 54). Defendants further argue that “when opposing parties tell  
10 two different stories, one of which is blatantly contradicted by the record, so that no  
11 reasonable jury could believe it, the court should not adopt that version of the facts for  
12 purposes of ruling on a motion for summary judgment.” *Id.* (quoting *Scott v. Harris*, 550  
13 U.S. 372, 380 (2007)).

14 Plaintiff offers only his own current contradicted statement in support of his  
15 allegation that he asked Dr. Bassham to pull tooth #3, tooth #3. Plaintiff offers no logical  
16 explanation for why in response to being asked to pull tooth #3, Dr. Bassham would write  
17 in the treatment record that plaintiff instead complained about the “last molar” (tooth #2)  
18 and would thereby pull a different tooth than plaintiff was complaining about. In the  
19 context of this factual record, plaintiff’s claim is implausible. As argued by defendants,  
20 “where ‘the factual contexts renders [the nonmoving party’s] claim implausible . . . .  
21 [that party] must come forward with more persuasive evidence to support [his] claim then  
22 would otherwise be necessary’ to show that there is a genuine issue for trial.” Dkt. 53, pp  
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1 13-14 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,  
2 587 (1986)).

3 In his response, plaintiff contends that Nurse Richter diagnosed plaintiff “with an  
4 abscess and had antibiotics prescribed.” Dkt. 70 (citing Dkt. 71, p. 44 (Exhibit “F”)).  
5 However, the record indicates that Nurse Richter assessed that plaintiff had an altered  
6 level of pain perception; she did not diagnose an abscess. Dkt. 71, p. 44. Regarding her  
7 suggested plan, she did prescribe antibiotics, but, instead of diagnosing an abscess, she  
8 instead indicated that there was a need to rule out the presence of an abscess. *See id.*  
9 (“DX: R/O Dental Abscess”). On her exam cited by plaintiff, she observed: “Some  
10 edema [swelling] no erythema [redness].” Dkt. 71, p. 44. This does not indicate abscess.  
11 Finally, as indicated in the record, Nurse Richter, as a nurse, is unable to diagnose  
12 impairments. Dkt. 59, p. 4.

14 Based on the record as a whole, for the reasons stated above, the Court concludes  
15 that plaintiff’s version of the events regarding which tooth needed extraction is blatantly  
16 contradicted by the record such that no reasonable jury could believe it. Therefore,  
17 defendants’ motion for summary judgment should be granted as to plaintiff’s claim that  
18 his Eighth Amendment rights were infringed because the wrong tooth was extracted.

19 Plaintiff’s medical malpractice and negligence claims regarding the allegation of  
20 the extraction of the “wrong” tooth also cannot survive based on the conclusion that  
21 plaintiff has failed to present admissible evidence to prove any material issue of fact with  
22 respect to the “incorrect” tooth being extracted. As just noted, plaintiff’s allegation that  
23 the incorrect tooth was extracted in July 2013 is directly contradicted by the volume of  
24

1 evidence in the record. Therefore, defendants’ motion for summary judgment should be  
2 granted as to plaintiff’s claims of medical malpractice and negligence, to the extent that  
3 plaintiff alleges that defendants extracted the incorrect tooth.

4 Even if the Court were to decline to adopt this recommendation regarding the  
5 alleged removal of the wrong tooth, defendants point out that the subjective component  
6 of plaintiff’s medical claim “relates to the defendants’ state of mind, and requires  
7 deliberate indifference.” Dkt. 53, pp. 11-12.

8 The state of mind required by defendants in order for plaintiff to prevail “is one of  
9 ‘deliberate indifference’ to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825,  
10 834 (1994) (citations omitted). The Supreme Court in *Farmer* was “require[d] [] to define  
11 the term ‘deliberate indifference’” and noted that while *Estelle v. Gamble*, 429 U.S. 97,  
12 106 (1976) established “that deliberate indifference entails something more than mere  
13 negligence, the cases are also clear that it is satisfied by something less than acts or  
14 omission for the very purpose of causing harm or with knowledge that harm will result.”  
15 *Id.* at 828, 835. The Court held “that a prison official cannot be held liable under the  
16 Eighth Amendment for denying an inmate humane conditions of confinement unless the  
17 official knows of and disregards an excessive risk to inmate health or safety.” *Id.* at 837.  
18 The Court explained that “the official must both be aware of the facts from which the  
19 inference could be drawn that a substantial risk of serious harm exists, and he must also  
20 draw the inference.” *Id.* The question of if “a prison official had the requisite knowledge  
21 of a substantial risk is a question of fact subject to demonstration in the usual ways,  
22 including inference from circumstantial evidence . . . .” *Id.* at 842 (citations omitted).  
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1 Here, plaintiff has offered no evidence on the issue of defendants' state of mind.  
2 For example, no evidence suggests that Dr. Bassham knew that plaintiff wanted tooth #3  
3 extracted but instead, intentionally, extracted the tooth #2. To the contrary, the only  
4 evidence, other than Dr. Bassham's declaration, regarding Dr. Bassham's state of mind is  
5 the dental treatment record, which includes his notes that plaintiff "complains of a strong  
6 ache in UR [upper right] last molar, [tooth #2]." *See* Dkt. 54-1, p. 4. Plaintiff does not  
7 allege any facts suggesting that any other defendant was involved in the extraction of  
8 tooth #2.

9  
10 Therefore, regarding plaintiff's allegations of the extraction of the wrong tooth,  
11 plaintiff has failed to allege facts suggesting that any defendant acted with the subjective  
12 state of mind of deliberate indifference. Therefore, defendants' motion for summary  
13 judgment should be granted as to any claims of deliberate indifference with respect to  
14 which tooth was extracted on July 18, 2013 even if the Court finds that plaintiff has  
15 raised an issue of material fact.

16 **b. Whether plaintiff was unreasonably denied medical treatment**  
17 **regarding tooth #3 after the extraction of tooth #2**

18 Plaintiff complains that he was unreasonably denied medical treatment with  
19 respect to tooth #3 and generally denied necessary medical care during the time  
20 immediately subsequent to the extraction of tooth #2. However, plaintiff has not  
21 submitted any opinion other than his own that the treatment he received was anything  
22 other than a difference of opinion, and plaintiff's allegation that his need for extraction of  
23 tooth #3 prior to the date of its extraction was sufficiently severe to constitute deliberate  
24

1 indifference is blatantly contradicted by the record and no reasonable jury could believe  
2 it.

3 “Because society does not expect that prisoners will have unqualified access to  
4 health care, deliberate indifference to medical needs amounts to an Eighth Amendment  
5 violation only if those needs are ‘serious.’” *Hudson*, 503 U.S. at 9. In addition, to  
6 establish deliberate indifference, a prisoner must show that a defendant purposefully  
7 ignored or failed to respond to the prisoner's pain or possible medical need. *See*  
8 *McGuckin*, *supra*, 974 F.2d at 1060; *Estelle*, *supra*, 429 U.S. at 104.

9  
10 As noted previously, shortly after plaintiff's extraction of tooth #2, plaintiff  
11 reported that he still had severe pain in the upper right corner of his mouth. *Id.* at ¶ 13;  
12 Dkt. 54-1, p. 4. On July 24, 2013, defendant Dr. Rodkey examined plaintiff and noted  
13 that the x-ray indicated that a “portion of distal tuberosity appears to have [fractured].”  
14 Dkt. 37, ¶¶ 14-18; Dkt. 54-1, p. 4. Plaintiff does not appear to contend that this fracture  
15 supports an independent claim, but to any extent that he does, such claim should be  
16 dismissed, as discussed below.

17 In his declaration, Dr. Bassham declares as follows:

18 When a tooth is removed, the bone overlaying the tooth roots may  
19 be thin and fragile and may even be bonded to or locked within the roots  
20 of the tooth. A piece of the thin bone may at times peel away or  
21 ‘fracture’ off as the tooth is removed. This happens most often on the  
22 buccal (cheek side) or tuberosity (bony prominence) in the upper arch of  
23 the mouth. The size of the fractured piece is usually small and has no  
24 effect on healing. Small fractures like the one just described is  
unavoidable in some cases and can be caused by any number of factors  
such as fragile bones, enlarged sinuses, or history of previous bone loss  
in the patient. In other cases, a larger piece of the bone may fracture  
during the extraction but would not break away, instead remaining held

1 in place of the gum tissues when the tooth is removed. Larger intact  
2 fractures of buccal bone may heal normally without further treatment. A  
larger fracture may not be observed by a provider during an extraction.

3 Areas of fractured bone and all the variations listed above are not  
fractures of the jaw.

4 . . . . .  
According to my notes in the [dental treatment record], the  
5 extraction of tooth #2 was considered routine . . . . There was no 'jaw  
fracture' during the extraction of #2. It was a simple, 'slip it out,' type of  
6 periodontally involved loose tooth.

7 Dkt. 54, ¶¶ 3-4.

8 Plaintiff has not offered any evidence that would create a material issue of fact  
9 regarding the above declaration of Dr. Bassham. Plaintiff also has not submitted any  
10 evidence regarding any required subjective state of mind necessary for a claim of  
11 deliberate indifference by Dr. Bassham. Therefore, the fracture itself cannot sustain such  
12 a claim and defendants' motion for summary judgment should be granted on this claim,  
13 as well.

14 Similarly, plaintiff has not submitted any evidence suggesting that the resultant  
15 fracture he suffered demonstrated that he had received treatment that was below a  
16 reasonable standard of care. In order to establish both the standard of care and to prove  
17 causation in a medical malpractice action, in most cases, expert medical testimony is  
18 required. *Guile v. Ballard Cmty. Hosp.*, 70 Wash. App. 18, 25, 851 P.2d 689 (1993).  
19 Furthermore, as noted by defendants, Dr. Rodkey noted at plaintiff's September 4, 2013  
20 appointment that the fractured tuberosity appeared to have healed according to an x-ray.  
21 Dkt. 53, p. 15 (citing Dkt. 59, ¶ 7 and Exhibit 2). Therefore, the fracture itself cannot  
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1 sustain a claim for medical malpractice and negligence and defendants' motion for  
2 summary judgment should be granted as to any such claims.

3 Dr. Rodkey informed plaintiff that this fracture was causing [some of] his pain.  
4 Dkt. 37, ¶ 15; Dkt. 59-1, p. 3. The treatment record indicates that Dr. Rodkey informed  
5 plaintiff that he recommended not extracting the remaining upper right molar "due to  
6 sensitivity due to last chewing molar on [upper right] side [of] mouth." Dkt. 59-1, p. 3.  
7 Also, at this time, Dr. Rodkey noted no pathology in tooth #3 and no disease causing  
8 tooth decay. *See* Dkt. 59, pp. 2, 10 (on 07/24/13: "#3 NPL [no pathologies noted] . . . .  
9 0 caries #3 noted"). Although plaintiff refers generally to "a dying nerve in the original  
10 tooth," there is no citation provided for this allegation and, other than his bare allegation,  
11 plaintiff has not provided any evidence that he was suffering from "a dying nerve." *See*  
12 Dkt. 70, p. 5.

14 Defendants contend that plaintiff has not demonstrated that his request for  
15 treatment on or an extraction of tooth #3, versus Dr. Rodkey's recommendation to the  
16 contrary, is anything other than a difference of opinion. This contention is persuasive.

17 As noted by plaintiff, "Eighth Amendment doctrine makes clear that a difference  
18 of opinion between a physician and the prisoner-or between medical professionals-  
19 concerning what medical care is appropriate does not amount to deliberate indifference."  
20 Dkt. 53, p. 17 (citing *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (citations  
21 and internal quotation marks omitted)).

23 Defendants had objective evidence supporting their decision not to provide earlier  
24 treatment to or extraction of tooth #3 prior to its treatment and extraction date.

1 As already noted, on July 24, 2013, Dr. Rodkey noted no pathology in tooth #3  
2 and no disease causing tooth decay. *See* Dkt. 59, pp. 2, 10. He prescribed Naproxen for  
3 plaintiff at this time. *See* Dkt. 71, p. 31. On August 16, 2013, Dr. Gantz examined  
4 plaintiff and observed “no swelling or redness.” Dkt. 71, p. 32. Dr. Gantz noted at that  
5 time that plaintiff “says that while on meds he had no pain.” *Id.* at 31. Dr. Gantz also  
6 prescribed Naproxen, which appears to be the prescription that plaintiff indicated was  
7 working. *See id.* Shortly thereafter, on August 29, 2013, Nurse Richter observed: “Some  
8 edema [swelling] no erythema [redness].” Dkt. 71, p. 44. On September 4, 2013, Dr.  
9 Rodkey observed that tooth “#3 shows slight inflammation but is adjacent to restoration  
10 margin.” Dkt. 58-1, p. 3. He also observed that there was “0 fistula; 0 exudate; 0 gross  
11 caries #3; no pain or discomfort elicited from palpation or from sliding rounded edge of  
12 Explorer over the areas of #2 and 3.” *Id.* Dr. Rodkey also indicated that the extraction site  
13 showed a “normal healing pattern,” and that x-rays demonstrated “complete tuberosity  
14 fusion,” indicating that the fracture had healed. *See* Dkt. 59, p. 13. On October 24, 2013,  
15 Dr. Rodkey observed no radiographic changes and on exam, “no responses [with]  
16 Explorer.” *Id.* at 14. On November 5, 2013, Dr. Rodkey opined that plaintiff had  
17 reversible pulpitis. Dkt. 59, p. 20. But, on November 15, 2013, plaintiff was experiencing  
18 “pain [] to cold and pressure as well as hot now - last week or so,” and Dr. Gantz  
19 indicated “that it sounds like the tooth has progressed to an irreversible pulpitis and we  
20 can extract it for him.” *Id.*; *see also* Dkt. 58, p. 9.

21  
22  
23 Plaintiff’s allegation that he needed extraction of tooth #3 prior to the date of its  
24 actual extraction is contradicted by all of the evidence of the record, other than plaintiff’s

1 bare allegations. The evidence delineated demonstrates that tooth #3 had not progressed  
2 to irreversible pulpitis until that last week before it was pulled. Objective evidence, from  
3 multiple doctors and a nurse, demonstrates no or few symptoms.

4 In addition, Dr. Rodkey pointed out a reason for his decision not to rely on  
5 plaintiff's subjective complaints of pain, as plaintiff had alleged that he had not eaten in  
6 three weeks; however, in contrast, Dr. Rodkey noted that plaintiff was weighed following  
7 leaving on September 4, 2013, and his "weight was eight ounces greater than [on] 6/4/13,  
8 so his statement was inconsistent given objective measurement - ('3 weeks of not  
9 eating')." *See id.* at 14. Similarly, Dr. Rodkey noted that plaintiff was not running a fever,  
10 that is, he "was afebrile (97.9 degrees) per encounter [with] [Nurse] Richter, RN2." *Id.*

12 The Court concludes that plaintiff's allegation that he needed additional treatment  
13 or extraction of tooth #3 prior to its treatment and extraction is blatantly contradicted by  
14 the record and no reasonable jury could believe it. Therefore, there are no true material  
15 facts in dispute on this claim, and the Court concludes that defendants' motion for  
16 summary judgment should be granted as to plaintiff's claim of deliberate indifference  
17 regarding any "delay" in the appropriate treatment of tooth #3.

18 Similarly, plaintiff provides no evidence other than his own bare allegation that  
19 the treatment he received fell below any reasonable standard of care. Therefore, the  
20 Court also concludes that plaintiff's claim regarding any "delay" in the treatment and  
21 extraction of tooth #3 as medical malpractice or negligence also should be dismissed with  
22 prejudice. *See Guile*, 70 Wash. App. at 25.

1                   **c. Whether plaintiff was unreasonably denied medication refills or**  
2                   **emergency treatment**

3                   In addition to plaintiff's claim that he received insufficient treatment of his tooth  
4                   #3 after the extraction of his tooth #2, that was just discussed by the Court, *see supra*,  
5                   section III, b, plaintiff also contends that he received insufficient medication for his pain  
6                   during this timeframe. In addition to his own declaration, plaintiff has submitted the  
7                   declaration of Joseph Medoro, who shared housing with plaintiff. *See* Dkt. 71, pp. 18-19.  
8                   Mr. Medoro witnessed plaintiff complaining of pain to staff; moaning in pain during the  
9                   night; staying in bed allegedly due to pain; and suffering from problems with his basic  
10                  daily activities. *See id.* Mr. Medoro discusses this pain behavior he witnessed in general  
11                  regarding a period of time of a few months. *See id.* In contrast, the record discussed  
12                  below indicates the time line more specifically in the context of treatment, and  
13                  demonstrates periods of time when plaintiff was receiving pain medication and/or was  
14                  not exhibiting pain behavior.

15                  Plaintiff does not refute that he was offered medication when Dr. Bassham  
16                  extracted tooth #2, but declined them, indicating that "he has pain meds." Dkt. 54, p. 9  
17                  (54-1, p. 4). Therefore, by plaintiff's own admission, he was not in need of pain  
18                  medication just after his extraction on July 18, 2013. *See id.*

19                  On July 24, 2013, plaintiff reported that he still had severe pain in the upper right  
20                  corner of his mouth, and defendant Dr. Grant Rodkey, DDS, examined plaintiff and took  
21                  an x-ray. Dkt. 59-1, p. 10. Dr. Rodkey informed plaintiff that he had a fracture and that  
22                  this fracture was causing some of his pain, as was a newly exposed distal root surface. *Id.*  
23                  24

1 at p. 11. The treatment record indicates that Dr. Rodkey wrote a prescription for  
2 Naproxen for plaintiff at this time, and also prescribed Dexamethasone. *Id.* In his  
3 declaration, Dr. Rodkey declares that the “purpose of Naproxen is similar to that of  
4 ibuprofen in helping to reduce inflammation at a site of pain.” Dkt. 59, p. 2. He also  
5 declares that “Dexamethasone, a steroid, works by reducing the body’s general  
6 inflammatory reaction, a different mechanism than ibuprofen and Naproxen.” *Id.*  
7 Importantly, Dr. Rodkey declares that he has “used this [combination of prescriptions]  
8 very successfully for pain relief with a variety of dental patients with various pain  
9 sources.” *Id.*  
10

11 Although plaintiff may have been in pain, he has provided no evidence suggesting  
12 that Dr. Rodkey’s provision of these prescriptions to deal with plaintiff’s pain is an  
13 inappropriate response, or that it falls below any standard of care. He also does not  
14 provide any evidence suggesting that Dr. Rodkey knew that these prescriptions would not  
15 work well, but prescribed them anyway. Therefore, the facts in the record do not support  
16 any claim that any Dr. Rodkey was deliberately indifferent or committed medical  
17 malpractice or negligence with respect to treatment of plaintiff’s pain.  
18

19 On August 14, 2013, plaintiff ran out of his prescribed medication “and he was  
20 still experiencing pain in his right temple.” Dkt. 37, ¶ 20. He asked a nurse for more  
21 medication and to get him an appointment to deal with what he thought was a  
22 complication that Dr. Rodkey had informed him about. *Id.* at ¶ 21. The nurse sent an  
23 email to defendant Escapule only requesting an appointment, and was informed that  
24 plaintiff already had an appointment. Dkt. 57-1, p. 2. Plaintiff alleges that because of the

1 wording of the email response from defendant Escapule to the nurse, (accusing plaintiff  
2 of lying), the nurse “denied [plaintiff] any pain medication (Naproxen) leaving [plaintiff]  
3 in serious pain and denying treatment.” Dkt. 37, ¶ 24.

4       Although plaintiff complains that defendant Escapule is responsible for denial of  
5 treatment, defendant Escapule indicated in her email response that on 7/24 plaintiff “was  
6 told by Dr. Rodkey that we would get him back in four weeks to evaluate that area (post-  
7 up again) [and] I have him scheduled 8/22.” Dkt. 57-1, p. 2. Plaintiff does not point to  
8 any evidence that would have put defendant Escapule on notice that she could not follow  
9 the doctor’s recommendation in the treatment record or that his already-scheduled  
10 appointment was insufficient.

11       Similarly, although plaintiff contends that defendant Escapule’s email response  
12 resulted in him being denied pain medication, there is nothing in the email sent to  
13 defendant Escapule cited by plaintiff indicating that plaintiff was out of pain medications  
14 or was requesting pain medications. *Id.* Instead, the email to defendant Escapule requests  
15 for her to schedule an appointment for plaintiff. *Id.* Defendant Escapule was not asked  
16 for a pain prescription, and there is no evidence that she has any ability or authority to  
17 provide pain medication. In addition, she was not informed that her response would be  
18 the basis for a denial of pain medication for plaintiff. The only action requested of her  
19 was to “please schedule asap,” and she replied that plaintiff already was on the schedule.  
20  
21 *Id.*

22       Plaintiff has not presented any evidence that defendant Escapule took any action  
23 indicating that she possessed the state of mind of intentionally disregarding a need for  
24

1 treatment or medication. Therefore, defendants’ motion for summary judgment should be  
2 granted as to plaintiff’s claim that defendant Escapule was deliberately indifferent to his  
3 need for treatment or medication.

4 Similarly, the Court notes that defendant Escapule is a dental assistant. *See* Dkt.  
5 57, p. 1. Plaintiff has not presented any facts suggesting that she breached any duty  
6 regarding his dental care, or that she had any ability or duty to ensure that he received  
7 appropriate medication. Nor has plaintiff submitted any evidence demonstrating that her  
8 actions fell below any particular standard of care. Therefore, to the extent that plaintiff  
9 attempts to bring medical malpractice and/or negligence claims against defendant  
10 Escapule, defendants’ motion for summary judgment should be granted as to such claims.

12 Plaintiff declared another dental emergency, and was seen by defendant Dr.  
13 Jonathan Gantz, DDS, on August 16, 2013. *Id.* at ¶ 26. According to Dr. Gantz's  
14 treatment record, plaintiff reported having pain in the upper right quadrant, reported that  
15 he had run out of meds, and reported that “while on meds he had no pain.” Dkt. 58, p. 1, ¶  
16 4; *see also* Dkt. 58-1, pp. 2-3. This treatment record directly contradicts plaintiff’s report  
17 of pain during this entire time. It also indicates that the x-rays performed “appear  
18 inconclusive as to healing of fractured tuberosity.” Dkt. 58-1, p. 2. Dr. Gantz performed  
19 an exam and noted his observations: “clinically, healing appears normal -- no swelling or  
20 redness.” *Id.* at 2-3. Plaintiff has not presented any evidence that could demonstrate that  
21 these observations were incorrect. As plaintiff’s healing appeared “normal,” and as he did  
22 not have any swelling or redness, there is no evidence that he was being denied treatment  
23 that was necessary at that time. Furthermore, at this appointment, plaintiff was provided a  
24

1 prescription for Naproxen, which is the medication that he had been on, which he  
2 apparently reported was sufficient to address his pain. *Id.* at 2.

3 Plaintiff alleges that he continued to complain in various ways about pain and  
4 swelling over the course of the next 10 days; however, as just noted, plaintiff had just  
5 received a prescription for his pain, which he had reported was working. *See id.*; *see also*,  
6 *e.g.*, Dkt. 37, ¶¶ 30, 32-33. He has not provided any evidence regarding inappropriateness  
7 or insufficiency of providing this prescription, or on it breaching any standard of care.  
8

9 On August 29, 2013, plaintiff “went to the evening pill line and spoke with  
10 Deborah Richter RN2.” *Id.* at ¶ 38. She gave him a quick exam and medications which  
11 brought down his swelling and gave him pain relief. *Id.* at ¶¶ 38-39; *see also* Dkt. 71, p.  
12 44 (Exhibit “F”).  
13

14 On September 4, 2013, plaintiff again sought treatment with Dr. Rodkey, who  
15 noted that plaintiff’s Tylenol three prescription had expired the previous day. Dkt. 58-1,  
16 p. 3. Dr. Rodkey also observed that tooth “#3 shows slight inflammation but is adjacent  
17 to restoration margin” and that there was “0 fistula; 0 exudate; 0 gross caries #3; [and] no  
18 pain or discomfort elicited from palpation or from sliding rounded edge of Explorer over  
19 the areas of #2 and 3.” Dkt. 58-1, p. 3. Dr. Rodkey also indicated that the extraction site  
20 showed a “normal healing pattern,” and that x-rays demonstrated “complete tuberosity  
21 fusion,” indicating that the fracture had healed. *See* Dkt. 59, p. 13. Therefore, at this  
22 appointment, the record demonstrates that plaintiff’s upper right quadrant of his mouth  
23 was healing normally, and further demonstrates that he was not exhibiting any pain or  
24

1 discomfort when the “rounded edge of Explorer [was moved] over the areas of [teeth] #2  
2 & 3.”

3  
4 Although plaintiff contends that he was suffering from extreme pain during this  
5 time, plaintiff’s allegation is completely contradicted by the dental treatment record.

6 On October 24, 2013, plaintiff reported only that he was experiencing pain on  
7 tooth #3 to hot and cold when eating, but otherwise “no symptoms.” Dkt. 59-1, p. 6. Dr.  
8 Rodkey observed no radiographic changes and on exam, “no responses [with] Explorer.”  
9 *Id.* The record does not reflect, and plaintiff does not present any evidence demonstrating,  
10 that plaintiff was in need of treatment or medication at this time that he did not receive.  
11

12 On November 5, 2013, Dr. Rodkey noted that plaintiff continued to report  
13 temperature sensitivity, as well as throbbing, “mainly when eating.” Dkt. 59-1, p. 12. He  
14 noted no radiographic changes. *Id.* Dr. Rodkey provided plaintiff with a prescription for  
15 Dexamethasone for swelling and pain. *Id.* Plaintiff has not provided any evidence  
16 demonstrating that he required additional treatment at this particular appointment, or that  
17 the pain prescription provided by Dr. Rodkey was insufficient. Again, plaintiff’s  
18 allegation that he was being denied necessary treatment is completely contradicted by the  
19 dental treatment record. Ten days later, plaintiff’s tooth #3 was extracted. Dkt. 58, p. 9.  
20

21 Plaintiff alleges that he was negligently being denied treatment and medication  
22 during the period of time when his healing objectively appeared to be progressing  
23 normally. Furthermore, the record demonstrates that plaintiff failed to demonstrate pain  
24

1 behaviors when the doctors touched the allegedly painful area with a dental tool (the  
2 “Explorer”). Although plaintiff attempts to raise an issue of material fact with his own  
3 allegations, and a declaration from another inmate indicating that plaintiff generally  
4 complained of pain over the course of several months, plaintiff’s allegations are directly  
5 and repeatedly contradicted by the contemporaneous record. Therefore, no reasonable  
6 fact finder could conclude that plaintiff’s version of the facts is correct, and defendants’  
7 motion for summary judgment should be granted as to all of plaintiff’s claims.  
8

#### 9 IV. Qualified Immunity

10 The Court has concluded that defendants’ motion for summary judgment should  
11 be granted as to all of plaintiff’s claims. Therefore, the issue of qualified immunity will  
12 not be discussed.  
13

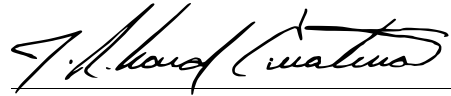
### 14 CONCLUSION

15 The undersigned recommends that defendants’ motion for summary judgment  
16 (Dkt. 53) be **GRANTED**; all of plaintiff’s claims should be **dismissed with prejudice**.

17 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
18 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.  
19 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
20 purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can  
21 result in a result in a waiver of those objections for purposes of appeal. *See Thomas v.*  
22 *Arn*, 474 U.S. 140 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012)  
23  
24

1 (citations omitted). Accommodating the time limit imposed by Rule 72(b), the Clerk is  
2 directed to set the matter for consideration on January 12, 2018, as noted in the caption.

3 Dated this 19th day of December, 2017.

4  
5 

6 J. Richard Creatura  
7 United States Magistrate Judge  
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